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No. 374099-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TRACFONE WIRELESS, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE

Respondent.

BRIEF OF T-MOBILE, U.S.A., INCORPORATED, AND CTIA – THE WIRELESS ASSOCIATION, *AMICI CURIAE* IN SUPPORT OF TRACFONE WIRELESS, INC.

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I. INTRODUCTION

Washington's Legislature has the authority to impose the E-911 tax on prepaid wireless services ("PWS"), but it has not yet done so. The current law does not, and as written cannot, apply properly to PWS. Several other states have recognized the difficulty of applying the E-911 tax to PWS and have responded with specific legislation. Rather than calling for legislation to properly apply Washington's E-911 tax to PWS, the Department of Revenue ("DOR") asks the Courts to engage in a series of analytical contortions to try to force Washington's E-911 tax to apply to PWS, contrary to the plain language of the statute.

Attempts to impose the current E-911 tax on PWS will result in uncertainty, unintended negative consequences, and a tax that is impossible to administer. The entire payment, collection and remittance structure of the Washington E-911 tax is based solely on a structure that is not present in the case of PWS. Accordingly, Washington courts will be called upon in the future to unsnarl the entanglements created by this enforcement, if it is permitted. Because these consequences reach well beyond the parties to this case, affecting dozens of service providers and millions of potential customers, T-Mobile U.S.A., Inc. ("T-Mobile"), and CTIA – The Wireless Association® ("CTIA"), submit this *amici curiae* brief in support of the appeal of plaintiff TracFone Wireless, Inc. ("TracFone"). This Court should hold that the existing E-911 tax is inapplicable to PWS for the alternative reasons discussed below.

II. IDENTITY AND INTEREST OF THE AMICI

T-Mobile offers a broad range of mobile telecommunications services, including wholesale and retail PWS throughout the United States. CTIA – The Wireless Association® ("CTIA") is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 700 MHz, cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products. The DOR's proposed application of the E-911 tax to PWS will have industry-wide significance to providers, such as T-Mobile, as well as their customers. The DOR's unauthorized position would require T-Mobile and other carriers to significantly overhaul how they deliver and administer PWS, effectively precluding them from offering PWS in the manner in which it is currently delivered.

For example, under DOR's approach, anonymous purchases of wireless PWS minutes would be replaced by demands for full name and address information, and freedom from monthly billing commitments would be replaced by a monthly tax bill of $.20 (costing more to mail than the amount of the tax). Finally, the current accessible price of PWS relative to other wireless services would be challenged by the increases in service cost that would accompany efforts to comply with the DOR approach. This would make PWS more costly for those who can least afford to pay the additional fees.

III. STANDARD OF REVIEW

The interpretation of a tax statute is a question of law and is reviewed de novo. *Whidbey Gen. Hosp. v. State of Wa., Department of Revenue*, 143 Wn.App. 620, 180 P.3d 796 (2008). A court's interpretation goal is to carry out the Legislature's intent and avoid any absurd or strained consequences. *Simpson Inv. Co. v. Wa. State Dep't of Revenue*, 141 Wn.2d 139, 148-149, 3 P.3d 741 (2000); *State of Washington v. Reier*, 127 Wn. App. 753, 757-758, 112 P.3d 566 (2005). "If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer." *Agrilink Foods, Inc. v. State of Wa. Dept. of Revenue*, 153 Wn.2d 392,396-397, 103 P.3d 1226 (2005)). When this standard is applied to the E-911 tax, it is clear that the DOR's proposed application of the tax to PWS is without support.

IV. ARGUMENT

A. Several provisions of the E-911 tax are entirely incompatible with the sale and operation of pre-paid wireless services.

The critical issue before this Court is whether the existing E-911 tax statute can be contorted to reach a new service and business model that was not specifically contemplated by the Legislature at the time of enactment. As several other states have recognized already, it cannot. While taxing statutes are sometimes drafted in a way that anticipates and can accommodate changes in ways of doing business, this is not always the case. The E-911 statute is based entirely on certain assumptions about

the manner in which service is provided, how it is billed and how the tax is collected and remitted. The way in which service is provided is, however, fundamentally different for post-paid wireless and PWS. Under Washington's E-911 statutory framework, the mandatory collection mechanism in RCW Ch. 82.14B cannot apply to PWS for several reasons (each of which is separately discussed below):

(1) PWS service is charged by-the-minute, not billed monthly;

(2) The service provider and/or seller does not know the user's PPU (defined below) or whether he is located within the relevant taxing jurisdiction; and

(3) The E-911 tax cannot be applied uniformly under the statute.

1. PWS service is charged by-the-minute, not billed monthly.

The plain language of RCW Ch. 82.14B demonstrates that the tax was designed to address the post-paid wireless service model, where customers receive ongoing wireless service in exchange for receiving (and paying) at the end of each month's use a **monthly** statement which invoices a fixed tax **per month.** *See, e.g.*, RCW 82.14B.040. RCW 82.14B.030(4) provides that: "A state enhanced 911 excise tax is imposed on all radio access lines whose place of primary use is located within the state in an amount of twenty cents **per month** for each radio access line." (Emphasis added). E-911 tax administration, the rate structure and the uniformity requirement all depend on the presence of monthly statements. Pre-paid wireless (PWS) customers, by contrast, anonymously purchase

service by the minute, and they have little or no contact with a service provider that would permit the service provider to capture the information needed to provide monthly statements. This Court should conclude that the E-911 tax does not apply to PWS customers because they do not purchase service on a monthly basis.

Separately, the E-911 tax applies only where the customer is sent a billing statement, which is not present for PWS. The required collection method is set forth in RCW 82.14B.040:

> . . .The state enhanced 911 tax and the county 911 tax on radio access lines shall be collected from the subscriber by the radio communications service company providing the radio access line to the subscriber. **The amount of the tax shall be stated separately on the billing statement which is sent to the subscriber.**

(Emphasis added).

The statute provides that the tax is to be remitted when subscribers pay their monthly "billing statements" for wireless service. This collection method is mandatory in order to achieve the uniformity of the monthly rate per line required by the statute. *Id.* ("the tax **shall** be stated separately on the billing statement") (emphasis added). The absence of billing statements renders administration impossible under the statute.

In the case of post-paid wireless service, the statute operates as intended because the service provider bills through monthly billing statements. The statute cannot apply as written to PWS since service is purchased in bulk minutes, before it is used, and no billing statements are provided. These differences are not mere technicalities, since the different

billing structure precludes proper calculation of the statutory tax rate or uniform application of the tax, as discussed below.

2. The service provider and/or seller does not know the user's PPU or whether he is located within the relevant taxing jurisdiction.

The E-911 tax also is not applicable, as written, to PWS as a result of its "place of primary use" requirement. The county and state E-911 taxes are imposed only on radio access lines "whose place of primary use is located within" the county or state. RCW 82.14B.030(2). Thus, a determination that the PPU is within a specific taxing jurisdiction is a prerequisite to the tax's application in that jurisdiction. The E-911 tax definition of PPU has the same meaning ascribed to PPU under the Federal Mobile Telecommunications Sourcing Act (the "MTSA"), P.L. 106-252. RCW 82.14B.020(9). Section 3 of the MTSA (which amended section 809(3) of the Communications Act of 1934 (47 U.S.C. 151 et. seq.)), provides that "PPU" means:

> the **street address representative** of where the customer's use of the mobile telecommunications service primarily occurs, which must be either–
>
> > (A) the **residential street address or the primary business street address of the customer**; and
> > (B) within the licensed service area of the home service provider.

(Emphasis added).[1] *See also* RCW 82.04.065(13) (adopting this definition). This definition requires the use of a "street address" to

[1] By its express terms, the MTSA does not apply to PWS. 47 U.S.C. 801 (c)(1).

determine whether the tax applies. No other PPU test is allowed by law. In the case of post-paid wireless, billing address information provides the PPU, and the statute operates as intended.

By contrast, PWS retail sellers and service providers have no subscriber address information. In the wholesale PWS setting, a service provider sells PWS access to retailers, such as grocery stores or gas stations, who in turn sell it to users. The wholesale service provider does not and cannot collect address information because there is no point-of-sale contact with users. Retail PWS sellers do not collect address information from customers, who often purchase PWS for the many benefits gained by not providing that information: it is less expensive due to lower administrative costs (e.g., no monthly billing); it is less burdensome because it does not require account set-up and monthly payments; and, it protects customer privacy. PWS service providers simply do not, and often cannot, have the information necessary to identify the PPU and administer the E-911 tax.

In an attempt to address this conundrum in its final determination in the TracFone matter at the administrative level (Executive Level Determination No. 06-00015E), DOR exceeded its statutory authority when it read into the E-911 tax a new, unstated requirement that the service provider prove a subscriber's PPU is not within the taxing jurisdiction in order to avoid taxation. The DOR describes its "interpretation" as follows:

> RCW 82.14B.030(4) imposes the E-911 tax upon "all radio access lines whose place of primary use is located

> within the state," Taxpayer has not disputed that its subscribers utilize radio access lines, thus the first element for imposing the tax is satisfied. Furthermore, **Taxpayer has presented no evidence that its subscriber's place of primary use is not within the state of Washington. Thus, the second element is also satisfied.** These two elements are the only requirements for imposing the tax under the statute. Consequently, we conclude that the plain meaning of RCW 82.14B.030(4) indicates that the E-911 tax applies to Taxpayer's prepaid wireless services.

Id. at p. 5 (emphasis added). This reasoning—with no basis in the statutory language— requires service providers to "prove the negative" without any means to do so because the PWS service provider is never in possession of address information.

Knowing that PWS providers do not (and most often cannot) collect information regarding a user's address, DOR's "test" concocts a presumption that has the effect of causing every PWS user in the United States to be subject to Washington's E-911 taxing authority unless the service provider can "prove" that the user's PPU is not in Washington state. Under the DOR's test, every customer of every provider of all PWS throughout the United States would be subject to the Washington E-911 tax unless they, too, can present evidence to the DOR that they do not have a PPU in Washington State. This example is illustrative:

> A PWS service provider sells 60-minute PWS cards wholesale to a gas station in Washington. One card is purchased with cash by a tourist from North Carolina. It is then used over the course of three months to make local calls exclusively in North Carolina.[2]

[2] Notably, under North Carolina's PWS E-911 statute, the tax could also be collected in North Carolina. *See* N. C. Gen. Stat. Ann. § 62A-43(b)(1) (providing that one method of collecting North Carolina's 911 tax on PWS "subscribers in [North Carolina]" is for the service provider to "[collect]

Under DOR's interpretation of the E-911 tax, the service provider, having no ability to determine the user's address, must "prove" that the user, who purchased the card in Washington, had a PPU in North Carolina in order to avoid the tax.[3] Without statutory support, the DOR seeks to create a presumption that, in the absence of evidence to the contrary, everyone's PPU is within Washington.[4]

DOR's "presumption" test is not found or implied anywhere in the statute, demonstrating the impossibility of extending the existing statute to a service it was never intended to address. This Court should conclude that RCW Ch. 82.14B does not extend to PWS for this reason as well.

3. The E-911 tax cannot be applied uniformly to PWS as required by the statute.

The E-911 tax statute requires that both the county tax and state tax be imposed at a certain, uniform rate per month:

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the service charge from each active prepaid wireless telephone service subscriber whose account balance is equal to or greater than the amount of the service charge").

[3] DOR's interpretation does not even distinguish between cards purchased within and outside Washington. The same result would apply when the card was purchased at a gas station in North Carolina and the service used in North Carolina.

[4] If the DOR's presumption is permitted, it will require all PWS providers nationwide to either (i) collect and remit the E-911 tax to Washington state or (ii) provide documentation to Washington state to demonstrate which of their customers PPUs are not within Washington. Since no PWS providers currently collect such information, the DOR's rule would require all PWS providers to modify their business practices to create such documentation for all of their tens-of-millions of customers across the country and provide it to the DOR.

> (2) The legislative authority of a county may also impose a county enhanced 911 excise tax on the use of radio access lines whose place of primary use is located within the county in an amount not exceeding fifty cents per month for each radio access line. The amount of tax **shall be uniform** for each radio access line . . . .
>
> (4) A state enhanced 911 excise tax is imposed on all radio access lines whose place of primary use is located within the state in an amount of twenty cents per month for each radio access line. The tax **shall be uniform** for each radio access line . . . .

RCW 82.14B.030 (Emphasis added). The statute does not allow varying tax rates within each such taxing jurisdiction, but requires that the amount of tax "shall be uniform" for each radio access line. However, PWS is not billed monthly, meaning the application to PWS of the current E-911 tax statute must be non-uniform because the time period over which a given purchase of PWS will be used cannot be predicted.

PWS service is purchased in quantities of useable time, typically without restriction on the time period of usage. For example, a purchase of 200 minutes may last a PWS customer one week, three months, six months, one year, or some other time period. There is no way for the PWS customer, the retailer, the service provider or the taxing authority to know at the time of the purchase how long it will take to use the PWS minutes. PWS providers do not track the time period over which PWS service is used because it is not relevant to providing or billing for the service. As a result, that information is not available to calculate the E-911 tax for PWS.

Absent monthly billing, the logical point at which the Washington

tax could be collected from taxpayers is when the minutes are purchased. However, this approach cannot succeed under current law because it is not possible to determine what amount of tax should be imposed at the time of purchase. For example, assume the following PWS airtime purchases:

- **Purchaser A** buys $10 worth of airtime on a new card, uses that time over 1 week, and then purchases 200 minutes more within the same calendar month.

- **Purchaser B**, who has been using existing minutes over some period, "recharges" an old card with 200 additional minutes and uses them over a period of 35 days.

- **Purchaser C** buys 200 minutes and forgets about the card when it falls into a kitchen drawer.

- **Purchaser D** buys $50 worth of minutes and uses them over a period of one year.

If a single $.20 tax were imposed upon purchase, each of A, B, C and D would all pay different monthly tax amounts—none of them correct-- because their service was used over different periods.[5] This is not solved by deducting the tax from customer PWS balances.

Given these few examples (and the myriad other possible periods of use), the tax cannot be applied uniformly if imposed at the time of purchase. In each instance, no one knows at the time of purchase the

[5] Purchaser A would overpay the tax, since it made two purchases of service (incurring two separate $.20 taxes) in a month. Purchaser B may be the closest to paying the proper amount of tax, but this is merely coincidental and will depend on whether the second purchase of time occurs within the same month. Purchaser C would either underpay or overpay the tax, since it purchased, but may never actually use, the service. Finally, purchaser D would underpay the tax, since it will use the service over twelve separate months, but will only have paid the $.20 "monthly" tax once.

period over which the service will be used. Other states have restructured their E-911 tax to address these issues. Washington has not yet passed legislation that can appropriately tax PWS.

Even if the maximum number of months over which the service could be used were known at the time that the service was first purchased, the uniformity problem remains. For example, if a PWS product were offered with an expiration date (*e.g.*, use within six months of purchase) and the tax was imposed based on the number of months from purchase through expiration, use of all the minutes prior to the expiration date would cause the user to overpay the tax. There is no authority in the statute for the imposition of the entire tax at the time of initial purchase. The current E-911 tax cannot be applied uniformly to PWS.

Even the secondary liability for tax that the DOR seeks to recover from TracFone cannot be shown to be based on a uniform tax. The tax figure was derived as an estimate without any connection to any particular transactions. If, as shown above, the tax cannot be imposed uniformly on PWS, the attempted imposition of a secondary liability on a purported tax collector (such as TracFone and others) does not make it uniform. The DOR should not impose the E-911 tax on a PWS service provider to which the Legislature never anticipated the tax would be applied: the DOR cannot explain how the secondary "collector's" liability for the tax was calculated, or even how it could be calculated. Estimates of tax liability should not be permitted where they are used as a mechanism to obscure the inability of the DOR to properly calculate the tax due,

particularly where the inability arises solely from the DOR's inappropriate overextension of the statute. The DOR's "estimate" of TracFone's secondary liability for the E-911 tax has no basis in the statute and is not uniform. Thus, TracFone's secondary liability, should not apply.

The uniformity problem is exacerbated where companies, such as T-Mobile and other companies represented by CTIA have millions of PWS customers. There will be a vast number of different time periods over which PWS will be used with no available calculation methodology that will enable a PWS provider to comply with the statute. Absent monthly billing statements attempts by companies to collect a monthly tax will result invariably in the collection of either too little or too much tax, which is directly contrary to the law's uniformity requirement.

B. The potential for multiple taxation and lack of apportionment inherent in the extension of the E-911 tax to PWS would result in the application of the tax in a manner that is unfair, unsound tax administration and unconstitutional.

The DOR's ability to impose Washington taxes, and to impose secondary liability on a tax collector, is not without limits. Taxes must be imposed in a manner that is not only consistent with the relevant statute, as discussed above, but also with the United States Constitution. RCW 82.14B.160 (E-911 taxes "do not apply to any activity . . .prohibited from taxing under the Constitution of [Washington] or the . . .United States"). The DOR's attempted application of the E-911 law to PWS is not just unfair and unsound tax administration, but its defects, including multiple

taxation, create probable Constitutional infirmities.

Multiple taxation of a single transaction is unfair, because it puts previously-taxed customers who are also taxed by Washington at an economic disadvantage. It is also unsound tax administration, since it ignores the authority of other states to tax transactions under their appropriately-conceived tax laws. Applying a tax statute in a manner that results in multiple taxation and which fails to properly apportion a tax would also violate the Commerce Clause. See, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287, 97 S. Ct. 1076 (1977). The DOR's proposed extension of the E-911 tax to PWS suffers from all three of these failings. Although the parties did not brief the constitutional issue below—and *amici* do not argue this as a basis for reversal—the enforcement and administrative deficiencies inherent in the DOR approach would raise important constitutional concerns. These constitutional issues will almost certainly be litigated in the future by parties similar to and represented by the amici if the trial court's decision is affirmed.

The enforcement, administrative and constitutional issues all arise from the same source--the DOR's failure to properly apply the PPU mechanism that the Legislature relied upon to assure the uniformity, administrability and constitutionality of the E-911 tax. Because all Washington taxes must be applied consistent with the Constitution, the

absence of an identified PPU in the case of PWS requires some other mechanism to prevent multiple taxation. This might include a credit for taxes paid to other states. The E-911 statute has no such mechanism, so the tax cannot be applied to PWS consistent with the Constitution.

The Constitution's Commerce Clause in Article I, section 8, has been applied by the courts to limit state taxes under a four-part test:

(i) the tax must be applied to an activity that has substantial nexus in the state;

(ii) the tax must be fairly apportioned to activities within the state;

(iii) the tax cannot discriminate against interstate commerce; and

(iv) the tax must be fairly related to services provided by the state.

Complete Auto Transit, Inc., 430 U.S. 274 at 277-279. A tax that fails any one of these tests is unconstitutional. *Id.* at 287.

The absence of any PPU or other information about the underlying purchases of PWS would prevent the DOR's defense of the E-911 tax under any of the four tests. For example, the absence of PPU information precludes a fair apportionment of the tax to activities within the state because purchasers may buy and use the PWS in Washington State or elsewhere and still be subject to the E-911 tax. DOR's attempted expansion of the E-911 tax to PWS must fail the apportionment test of *Complete Auto Transit.*

In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169, 103 S. Ct 2933 (1983), the Court established a two-part refinement of the apportionment analysis.

> "Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency – that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed. . ."

Thus, if every state applies an identical tax, "internal consistency" is achieved only if there is no multiple taxation of a single transaction. The DOR's proposal to apply E-911 to PWS fails this test--if every state applied Washington's E-911 tax without PPU information, there would be multiple taxation in at least some circumstances.

The internal consistency test has been applied to taxes on telecommunications. In *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582 (1989) the court upheld an Illinois tax on the charge for interstate telecommunications that either originated or terminated in Illinois, if they were charged to an Illinois service address. Internal consistency was present because "if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call." *Id.* at 261. In that case, the key to internal consistency was the presence of customer service address information that enabled the state to ensure that it was not subjecting customers to multiple taxation. In this case, there is no address information available.

Mobile communications present special challenges for the internal consistency test and for apportionment generally. Goldberg's internal consistency test requires that the service or billing address be in the state,

and that the call must originate or terminate there. Mobile calls can be placed and received anywhere, making it almost impossible to track whether the "call origination" or "call termination" are within the taxing jurisdiction.

Congress addressed these mobile communications issues by passing the MTSA, which changed the "sourcing" rules for most types of mobile communications. *See* 47 U.S.C. 151 *et. seq.* Under the MTSA, mobile telecommunications services are taxed by sourcing all calls to a place of primary use ("PPU"), regardless of the place of origination or termination of the service or the intrastate character of the call. *Id.* at § 802(b). The MTSA approach assumes that all wireless calls are made at the customer's residential or business street address, whichever is the PPU, allowing taxing authorities to tax all the calls charged to those PPUs within their jurisdiction. *Id.* at §§ 809(3), 807. By limiting the ability of other (non-PPU) states to tax mobile calls (even if the call originates or terminates in that state), the MTSA avoided the constitutional problem of multiple taxation for mobile communications raised in *Goldberg*.

The mechanism used by the MTSA to address internal consistency is the PPU. By its express terms, the MTSA does not, however, apply to PWS. *Id.* at § 801(c)(1). As a result, the MTSA does not offer sourcing rules to cover PWS. States may cross-reference MTSA definitions such as "PPU," as Washington has done, but cannot rely on MTSA mechanisms to provide constitutional sourcing rules for PWS. States must rely solely on other approaches to meet the constitutional requirements of *Complete Auto*

Transit and *Goldberg*.

Washington's E-911 tax must pass constitutional muster without relying on the MTSA. Washington's E-911 tax would fail to pass constitutional scrutiny because, as the DOR is aware, PWS providers do not have (1) customer names, (2) customer addresses, (3) an ongoing billing relationship with customers, (4) knowledge of whether a purchaser resides or is present in Washington, (5) knowledge of where the service will be used, or any other information that can perform the function of PPU information. The following scenarios illustrate how multiple taxation would arise under the DOR's approach:

- **Customer A** purchases PWS in Washington and uses the minutes in both Washington and another state that applies an E-911 tax.

- **Customer B** purchases PWS in another state and uses the minutes in both Washington and another state that applies an E-911 tax.

- **Customer C** purchases PWS in Washington but uses the minutes exclusively in another state that applies an E-911 tax.

- **Customer D** purchases PWS in another state and uses the minutes exclusively in another state that applies an E-911 tax.

In contrast to Washington, other states have crafted legislation that specifically addresses PWS, including imposing the tax on customers in those states or at the point of sale. *See* subsection C, *supra* (describing Virginia's statute as an example).

A properly configured credit can address multiple taxation concerns. There is no mechanism under Washington's E-911 tax to

provide a credit for E-911 taxes paid to another state. The absence of a mechanism to avoid double taxation here would preclude the statute from passing constitutional muster. Thus, the DOR's attempted application of the Washington E-911 statute to PWS would render it unconstitutional.

C. States other than Washington have revised their E-911 tax statutes to address the statutory contradictions ignored by DOR.

Washington is not unique in creating a tax to support enhanced 911 services. Unlike Washington, other states have recognized the problems inherent in taxing PWS in the same manner as post-paid wireless, crafting specific E-911 tax statutes accordingly. For example, Virginia enacted in 2005 legislation providing the following options for a PWS E-911 tax:

> For CMRS customers who purchase CMRS **service on a prepaid basis, the wireless E-911 surcharge shall be determined according to one of the following methodologies**:
>
> a. The CMRS provider and CMRS reseller shall collect, on a monthly basis, the wireless E-911 surcharge from each active prepaid customer whose account balance is equal to or greater than the amount of the surcharge; or
>
> b. The CMRS provider and CMRS reseller shall divide its total earned prepaid wireless telephone revenue with respect to prepaid customers in the Commonwealth within the monthly E-911 reporting period by $50, multiply the quotient by the surcharge amount, and pay the resulting amount to the Board without collecting a separate charge from its prepaid customers for such amount; or
>
> c. The CMRS provider and CMRS reseller shall collect the surcharge at the point of sale.

Va. Code Ann. § 56-484.17 (emphasis added) (attached as Exhibit 1). Many other states have enacted similar legislation, providing a specific

procedure for calculating the tax on PWS. *See, e.g.*, Ky. Rev. Stat. Ann. § 65.7635(1)(b),(c) (Ex. 2); Tenn. Code Ann. § 7-86-108(b)(iv) (Ex. 3). These state legislatures recognized the need to account for the differences between the post-paid and pre-paid wireless business models. Washington's Legislature can do the same but has not yet done so. ." Other states' E-911 legislation show that it is possible to impose fairly and constitutionally an E-911 tax on PWS, but that such legislation must be intended to do so in order to properly apply the tax. The DOR should not be permitted to apply the tax to PWS customers or service providers in the absence of such appropriate legislation.

IV. CONCLUSION

For the foregoing reasons, amici respectfully suggests that this Court should reject DOR's attempt to force PWS into the entirely incompatible E-911 statute. *See Simpson Inv. Co. v. State, Dept. of Revenue*, 141 Wn.2d 139, 169, 3 P.3d 741 (2000) (Alexander, J. dissenting) (stretching the judicial interpretation of a tax statute to reach an unintended activity is "akin to an attempt to pound a square peg into a round hole" and should be discouraged in favor of allowing the Legislature to amend the statute).

DATED this ___ day of _____, 2009.

Respectfully submitted,

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Certificate of Service

I certify that on _____, 2009, I served counsel of record in this matter with the "Brief of T-Mobile, U.S.A., Incorporated, and CTIA – The Wiireless Association, *Amicus Curiae* in Support of Tracfone Wireless, Inc. by causing a messenger to deliver a copy to each of them at the following locations:

_____

Stephen A. Smith